
Part 1 – The meaning of ‘Judicial Review’

Judicial Review has been defined by WJ Waluchow as follows:1

A practice whereby courts are sometimes called upon to review a law or some other official act of government (e.g. the decision of an administrative agency such as a state or provincial labour relations board) to determine its constitutionality, or perhaps its reasonableness, rationality, or its compatibility with fundamental principles of justice.

It is important to note that judicial review is not new. Judicial review has existed at least since the time of the English prerogative writs, and in the former British colonies of Australia, Canada and New Zealand, amongst others, since the time those States came into existence.2 It has always been a part of the common law of those countries, whether this has been acknowledged or not. The ultra vires principle operates, in the case of federal states, to invalidate state or provincial laws that are inconsistent with federal laws,3 or actions of municipal governments that are inconsistent with their enabling legislation, as well as those of administrative decision makers.

Bastarache J of the Supreme Court of Canada, writing extrajudically, has defined the term ‘judicial review’, in terms of review of administrative decisions, as ‘the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority’,4 quoting paragraph 28 of the judgement in Dunsmuir v New Brunswick.5 That paragraph went on to say that ‘the function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes’.

From these definitions, we can see that judicial review in administrative law involves the review by one branch of government, the judiciary, of a decision

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2 For an early case involving judicial review of administrative decisions, see Potter v Minahan (1908) 7 CLR 277.
3 See for example s 109 of the Constitution.
made by another branch of government, the executive. It can therefore be distinguished from an appeal from a lower court. The purpose of judicial review is for the court to examine whether the decision maker had the power to make the decision or grant the remedies in question (or even embark on the decision-making process in the first place), the process by which the decision was reached (for example, failure to afford procedural fairness), or the substance of the decision itself (review on the basis of ‘reasonableness’, however this term is defined).

De Smith notes two essential principles of true judicial review, as follows. Firstly, the issue of a prerogative writ (a term that will be defined shortly) is never given as of right – instead, the applicant must demonstrate why the writ should be granted. Secondly, the remedies on judicial review are discretionary, meaning that a remedy will not be granted if, for example, there has been delay on the part of the applicant, or the applicant has been guilty of misconduct of some kind.

The courts themselves have weighed in on the purpose of judicial review. In Council for Civil Service Unions v Minister for the Civil Service (popularly known as the ‘GCHQ Case’), Diplock LJ stated that the role of the courts in judicial review was to:

(i) Oversee the application of the law by ensuring that all and only relevant matters are taken into account in making a decision;

(ii) Ensure that fair procedures are followed; and

(iii) Ensure that the decision made is rational and reasonable in all the circumstances.

Judicial review can be contrasted with a statutory appeal. In some cases, an Act itself will provide for an appeal against an administrative decision to a court. For example, s 476 of the Migration Act 1958 gives the Federal Circuit Court jurisdiction to review decisions of the Migration Review Tribunal and Refugee Review Tribunal for jurisdictional error. In Australia, the two terms are generally used interchangeably by lower courts. However, the distinction may prove to be of more significance in the High Court, because s 75 of the Australian Constitution guarantees some form of judicial review of administrative decisions, at least in that court.

One matter that is omitted from these definitions is what the courts can do if they find that a decision fails to meet any one of the criteria specified above.

7 Ibid at 44.
8 (1985) 1 AC 374 at 407.
In general, a court will have the power to set aside (‘quash’) a decision made without jurisdiction, or in breach of requirements of procedural or substantive fairness, and remit that decision to the individual or body concerned for reconsideration. A court cannot, in most cases, simply substitute its decision for that of an administrative decision maker. However, if a court is unable to actually do anything about a decision that falls foul of these principles, one wonders whether it is a true ‘judicial review’.9

Why does Judicial Review exist at all?

The next question is ‘why does judicial review of the decisions of administrators exist in the first place'? Why does a court have the authority to overturn a decision of the executive? There are three reasons – the historical prerogative writs and the background of the common law, decisions of the courts themselves, and constitutional entrenchment.

The shared common law

Modern administrative law in common law countries is based on the old English ‘prerogative writs’. The writs were really a form of remedy for inappropriate administrative action or inaction as the case may be. The most important of these writs were mandamus, or an order to compel a decision maker to exercise their jurisdiction; prohibition, which was effectively a form of injunction preventing a decision maker from hearing a case; certiorari, which was originally ‘essentially a royal demand for information’,10 but became a means by which a court could quash the decision of an administrator and order that the decision be made again, and habeas corpus, literally ‘produce the body’, which was usually an inquiry as to the legality of the detention of an individual. As can be seen from the name ‘prerogative writs’, the writs are discretionary in nature, and courts today retain the ability to refuse relief in situations such as the applicant not coming to the court with ‘clean hands’.11

The usefulness of the old writs varies from jurisdiction to jurisdiction. At one extreme, they have been abolished in the Canadian province of British Columbia, and replaced by the general application for judicial review, through which a

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9 This was an argument raised by Hill J (sitting at first instance) in Eshetu v Minister for Immigration and Ethnic Affairs (1997) FCA 19, and by the applicants in Abebe v The Commonwealth; Re Minister for Immigration and Multicultural Affairs, Ex parte Abebe (1999) 162 ALR 1.
10 De Smith, supra n6 at 45.
reviewing court may grant relief ‘in the nature of’ the old remedy. On the other hand, the writs still have significant currency in Australia, at least at the High Court level, because they are specifically provided for in the Constitution.

The constitutional baseline set by *Marbury v Madison*

The US case of *Marbury v Madison* has been relied on in Australia as a basis for the existence of judicial review. In that case, Marshall CJ stated as follows:

> It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each … If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

That is, if a law is contrary to the constitution, it can and indeed must be overturned by the courts. The same principle can be applied to administrative decisions – if the decision is in some way contrary to the law, whether that be the constitution or the enabling legislation granting powers to the administrative decision maker, it can be set aside and a new decision ordered.

Marshall CJ identified a number of justifications for judicial review in his judgement. These include the written text of the constitution, which Marshall saw as ordinary law, although ‘supreme’ over all other ordinary laws, the constitutional role of judges, which entails an ability to enforce their interpretations of the constitution against other branches of government; the grant of jurisdiction to the court for ‘all cases arising under the Constitution’, the fact that judges and the President were required to swear an oath which, in part, required them to uphold the Constitution, and the views of the framers.

*Marbury v Madison*, despite being a decision based on the construction of the US constitution, has been enthusiastically supported in Australia. In *Attorney-General (Western Australia) v Marquet* the High Court stated as follows:

> Unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan

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12 Subsections 2(1) and (2) of the *Judicial Review Procedure Act (BC)*, RSBC 1996 c 241.
13 (1803) 5 US (1 Cranch) 137 at 177.
15 Article III, Section 2 of the US Constitution.
16 Supra n12 at 180.
17 (2003) 217 CLR 545 at paragraph 66.
precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in *Australian Communist Party v The Commonwealth*,18 ‘in our system the principle of *Marbury v Madison* is accepted as axiomatic’. It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power.

**A consequence of constitutional entrenchment**

This brings us neatly to the final reason for judicial review, which is that it is enshrined in some jurisdictions’ constitutions. The best example of this is s 75 of the *Constitution Act 1900* (Australia), which provides as follows:

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

The writ of certiorari was omitted from s 75(v) of the Constitution. However, the High Court has found on multiple occasions that it has the power to make an order of certiorari that is ancillary to an order for mandamus or prohibition.19 Also, ss 30 and 32 of the Australian *Judiciary Act 1901* give the High Court the power to make such orders in specified circumstances.

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18 (1953) 83 CLR 1 at 262.

19 See for example *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
Part 2 – Constitutional entrenchment in Australia

The judicial power of the Commonwealth

Chapter III of the Australian Constitution is entitled ‘The Judicature’, and s 71, the first section in Chapter III, provides as follows:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

A striking feature of Chapter III is that the term ‘judicial power’ is nowhere defined. It must therefore have been intended to be left to the High Court itself to determine what ‘judicial power’ actually is. There is, however, a marked lack of authority on this point. Stephen Gageler SC, then the Solicitor-General of Australia and now a High Court judge, has commented that ‘[t]he largest and most emphatic words in the Constitution – take “judicial power” and “absolutely free” as well-worn examples – have no fixed or intrinsic meaning and it would be in vain to attempt to search for one’.20 Tony Blackshield and George Williams QC have stated as follows:21

The characteristics and content of ‘judicial power’ have not proved susceptible to precise definition. In Tasmanian Breweries, Windeyer J observed that ‘the concept seems … to defy, perhaps it were better to say, transcend, purely abstract conceptual analysis’.22 In Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, McHugh J noted that ‘the line between judicial power and executive power in particular is very blurred’,23 and that the classification of a power ‘frequently depends upon a value judgement … having regard to the circumstances which call for its exercise … The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an

23 (1992) 176 CLR 1 at 67.
important, and sometimes decisive, part’. And in *R v Quinn, Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, Aicken J concluded that ‘in substance, all that the courts have been able to say towards a definition has been the formulation of negative propositions by which it has been said that no one list of factors is itself conclusive and perhaps the presence of all is not conclusive’.

Despite this unpromising background, Blackshield and Williams state that the ‘classic’ definition of judicial power is still that given by Griffith CJ in *Huddart, Parker and Co Ltd v Moorehead*, in which his Honour stated as follows:

\[\text{I am of the opinion that the words ‘judicial power’ as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.}\]

That is, unless there is a final determination of existing rights to be made, there is no exercise of ‘judicial power’. The High Court has also made clear a number of particular propositions in relation to what is or is not judicial review. For example, the High Court has found that giving an advisory opinion is not an exercise of judicial power, but making of control orders applied to terrorism suspects and persons convicted of sexual offences after their release from prison is.

Australian courts have also made it clear that judicial power may not be exercised by a body other than a Chapter III court, and a judicial body may not exercise executive power. This principle has been enunciated many times by the High Court, most notably in *R v Kirby; Ex parte Boilermakers’ Society of Australia*, which found that the Court of Conciliation and Arbitration could not exercise both the power to impose an award on the parties to an industrial dispute, and provide a final and binding legal interpretation of that award. The *Boilermakers* decision also makes clear that Chapter III is an exhaustive statement of the judicial power of the Commonwealth. The majority judges, Dixon CJ and McTiernan,

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24 Ibid.
25 (1977) 138 CLR 1 at 15.
26 Blackshield and Williams QC, supra n21 at 662.
27 (1909) 8 CLR 330 at 357.
31 (1956) 94 CLR 254.
Fullagar and Kitto JJ, stated that Chapter III is ‘an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested … No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III’.32

An interesting illustration of this principle can be seen in *Lim v Minister for Immigration, Local Government and Ethnic Affairs.*33 In that case, the applicant argued that a number of provisions of the *Migration Act 1958* which provided for the mandatory detention of ‘designated persons’ (persons who arrived in Australia by boat without a visa or entry permit, and given a ‘designation’ by the Department) were unconstitutional on a number of grounds, including that orders for detention were inherently punitive in nature, and therefore amounted to an exercise of the judicial power of the Commonwealth. The High Court found that s 54L, which provided that a designated person must not be released from detention unless granted a visa or removed from Australia, and s 54N, which required an ‘officer’ to detain a person reasonably suspected of being a designated person, without a warrant, were valid, as they were powers exercised incidentally to s 51(xix) of the Constitution, and were not an exercise of judicial power. They could therefore be exercised by administrative decision makers.

‘Judicial power’ and ‘merits review’

For the purposes of this topic, the crucial issue is the distinction drawn by Australian courts between ‘merits review’ and ‘judicial review’. There have been more cases than can possibly be referred to in which courts have stated that they are not to interfere in the merits of a decision, but the reasons why this is the case, even leaving aside the pejorative use of the word ‘interfere’, are rather obscure.

Australian courts have generally taken the view that a court must stay out of consideration of the ‘merits’ of a decision altogether. A frequently cited statement of the rule against merits review by courts can be found in *Attorney-General (NSW) v Quin,* in which Brennan J (as he then was) stated as follows:34

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice.

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32 Ibid at 270.
34 (1990) 170 CLR 1 at 36.
or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The key phrase is, of course, ‘to the extent that they [the merits] can be distinguished from legality’. Margaret Allars makes the following points on that issue:\(^{35}\)

Three principles of judicial review qualify the operation of the legality/merits distinction. First, review for abuse of power where a decision is *Wednesbury* unreasonable is in practical terms review of the factual basis of the decision. The *Wednesbury* test of abuse of power permits the court to strike down a decision which is so unreasonable that no reasonable decision maker could have reached it. This ground effectively sanctions as review for legality what is review of the merits in extreme cases of disproportionate decisions. Second, according to the ‘no evidence’ principle, an agency makes an error of law in the course of making a finding of fact if there is a complete absence of evidence to support the factual inference. The third qualification to the legality/merits distinction is the jurisdictional fact doctrine.

‘Merits review’ and ‘review of the merits’ distinguished

Much of the difficulty in this area can be resolved by carefully distinguishing the terms ‘merits review’ and ‘review of the merits’. David Bennett has defined the terms ‘merits review’ and ‘judicial review’ as follows:\(^{36}\)

A merits review body will ‘stand in the shoes’ of the primary decision maker, and will make a fresh decision based upon all the evidence available to it. The object of merits review is to ensure that the ‘correct or preferable’\(^{37}\) decision is made on the material before the review body. The object of judicial review, on the other hand, is to ensure that the decision made by the primary decision maker was properly made within the legal limits of the relevant power.

That is, it is the role of a primary decision maker, or review tribunal, to make a new decision on the evidence before it. This is the same principle that the House of Lords enunciated in *Huang v Secretary of State for the Home Department*,\(^ {38}\)

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36 Ibid at 7.
37 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68.
where it found that the administrative adjudicator reviewing a primary decision had not fulfilled their function when they focused on whether there was an error in that primary decision. Instead, the adjudicator’s role was to make a new decision on the basis of all the evidence, including evidence that may not have been available to the Home Department, before them.

It does not, however, follow that there is therefore no role in examining the merits of a case for a court. The court’s role is judicial review— it is not the role of a court to simply reopen a case and make any order it sees fit. Its role is to review the administrative decision before it.\textsuperscript{39} If the court stays out of substantive decision-making and limits itself to a review of the decision and, if the decision is to be set aside, remits it to the appropriate decision maker for reconsideration, this is an exercise of judicial and not executive power, even if the ‘substance’ or the ‘merits’ of the decision are in question. It does not offend the \textit{Boilermakers} principle that judicial power cannot be exercised by any other body than a Chapter III court, and nor may an administrative body exercise anything other than executive power.

\textit{Sun v Minister for Immigration and Ethnic Affairs}

A consideration of two Australian cases illustrates this point. In \textit{Sun v Minister for Immigration and Ethnic Affairs},\textsuperscript{40} The applicant in \textit{Sun} had been before the Refugee Review Tribunal (RRT) three times. The first decision, made by Member Fordham, accepted the truth of most (although not all) of the applicant’s claims, but found that he was not a refugee. As the Department prepared to remove Mr Sun from Australia, the Chinese consulate refused to issue him with a passport, claiming they could not identify him. Mr Sun took this as further evidence of persecution, and applied again for refugee status.\textsuperscript{41} This second application was also refused by the Department, and then by a different member of the RRT, Ms Ransome. Ms Ransome’s decision was ultimately set aside by consent, on the fairly technical basis that she had referred to an incorrect provision of the \textit{Migration Act 1958} in her decision.

The matter then went back for a third time to the RRT, this time before Member Smidt. Ms Smidt undertook a \textit{de novo} review, in the face of Mr Sun’s objection that she should accept Mr Fordham’s finding that he was telling the truth about most of his claims, and that the only issue was whether he was a refugee on the basis of those facts. The full Federal Court found no error in Ms Smidt’s

\footnotesize{\textsuperscript{39} See for example \textit{SZBEL v MIMIA} (2006) HCA 63, at paragraphs 34 and 40.  
\textsuperscript{40} (1997) 81 FCR 71.  
\textsuperscript{41} This course of action would now be prohibited by s 48A of the \textit{Migration Act 1958}. Section 48A did not exist at the time of Mr Sun’s second application.}
approach to the matter in that sense.\footnote{Supra n40 at 83.} Ms Smidt, unlike Mr Fordham, found that Mr Sun had fabricated most of his claims and again refused his application for review.

The full Federal Court, however, set Ms Smidt’s decision aside on procedural fairness grounds. The question that remained was what to do with Mr Sun. There was uncontradicted evidence before the court (and Ms Smidt) that Mr Sun was suffering from post-traumatic stress disorder,\footnote{Ibid at 81–83.} and the court was clearly concerned about putting him through another RRT hearing. The leading judgement was given by Wilcox and Burchett JJ, but North J, who concurred in the result, added as follows on the disposal of the case in the final paragraph of the judgement:\footnote{Ibid at 137.}

Finally, I wish to refer to the observation by Wilcox J that the Minister should consider exercising his power under s 417 in favour of the appellant. As the comprehensive analysis made by Wilcox J in his judgment reveals, the Court has had the opportunity to examine the entire history of the appellant’s involvement in the review system. The circumstances of this case are exceptional and call for a quick and humane conclusion in favour of the appellant. No doubt, in many approaches to the Minister, cases are urged as ‘special cases’ which are special only in the eyes of their proponents. The history of this case does make it special. It is special because the appellant has special problems of depression and post-traumatic stress disorder arising out of the circumstances of the case. It is special because there have been a number of errors in the review system. A number of these errors make it oppressive to require the appellant to have to face another hearing.

North J seemed sorely tempted to make some kind of declaration that Mr Sun was a refugee, but declined to do so. Making an order to this effect would go beyond judicial review of an administrative decision, and would be an exercise of executive power.

The \textit{Guo} litigation

\textit{Sun} should be compared to the \textit{Guo} cases in the full Federal Court and then the High Court. In the Full Federal Court, Einfeld J, having first ruled that an asylum seeker should be found to be a refugee unless the contrary could be
proved beyond reasonable doubt,\(^{45}\) then made orders to the effect that Mr Guo and his wife Ms Pan were refugees and ‘entitled to the appropriate entry visas’.\(^{46}\) Foster J agreed with the orders proposed by Einfeld J.\(^{47}\)

In a rare 7-0 judgement, the High Court\(^{48}\) overturned both the ‘beyond reasonable doubt’ approach to refugee decision-making proposed by Einfeld J, and the orders his Honour proposed. The majority judges (Brennan CJ and Dawson, Toohey, Gaudron, McHugh and Gummow JJ) found on the first point that ‘[i]ngenious as his Honour’s approach may be, it is not supported by the terms of the Convention or the proper approach to administrative decision making in this context’.\(^{49}\) On the power to make orders, the majority stated as follows:\(^{50}\)

> The orders of the Full Court included a declaration ‘that both appellants are refugees and are entitled to the appropriate entry visas’. A declaration in these terms lacked utility because it did not specify with reference to the legislation the ‘appropriate entry visas’ nor did it indicate any ready means of identification thereof. A declaration so loosely framed is objectionable in form.

Moreover, a declaration, even if drawn in specific terms, should not have been made. The Tribunal was empowered by s 166BC(1) of the Act to exercise all the powers and discretions conferred upon the primary decision maker. The Act provided (s 22AA) for determination by the Minister that a person was a refugee, but this power was exercisable upon the Minister being satisfied that a person had that status or character. The rights of the appellants to the issue of visas, which the Full Court purported to declare with present effect, would only arise upon satisfaction of statutory conditions including the determination by the Minister under s 22AA or by the Tribunal under s 166BC. In those circumstances, the appropriate course would have been for the Full Court to set aside the orders of Sackville J and to return the matter to the Tribunal for determination in accordance with law.

Kirby J concurred as follows:\(^{51}\)

\(^{45}\) *Guo v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 421, paragraph 25 of the judgment of Einfeld J.

\(^{46}\) Ibid at paragraphs 63 and 68. Incidentally, there is no such a thing as an ‘entry visa’ in the current legislation – Einfeld J apparently conflated the terms ‘visa’ and ‘entry permit’. The latter kind of document was abolished with the passage of the *Migration Reform Act 1992*, which came into effect on 1 September 1994, and the visa has been the sole authority for entry to Australia by a non-citizen since that date.

\(^{47}\) Ibid at paragraph 54 of the judgment of Foster J.

\(^{48}\) *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

\(^{49}\) Ibid at 574.

\(^{50}\) Ibid at 579.

\(^{51}\) Ibid at 600.
It is sufficient in my view to say that it was not appropriate for the Federal Court to adopt the course which the majority did. The proper course, legal error having been found, was to return the matter to the Tribunal. In that way, each of the relevant organs of government performs the functions proper to it. The Judicial Branch authoritatively clarifies and declares the law as it applies to the facts found. The Executive Branch, by power vested in it by the Legislature, performs its functions according to the law as so clarified and declared. Neither branch usurps or intrudes upon the functions proper to the other.

It is no part of the judicial function to make a decision of an administrative nature such as the grant of a visa. This is indeed a breach of the principle of separation of powers. This does not mean, however, that a court has no place in reviewing the merits of a decision, and leaving the substantive decision to the duly designated administrative decision maker. This kind of reasoning complies with the admonition of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that ‘[i]t is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator’\(^\text{52}\) while still ensuring that the courts can truly review the merits of the decision.

Kirby J also noted in *Guo* as follows:\(^\text{53}\)

> [C]are must be exercised in applying decisions about the available and appropriate remedy apt to an appeal when the process before the Court is that of judicial review. Whereas on appeal a court will often enjoy the power and responsibility of substituting its decision for that under appeal, judicial review is designed, fundamentally, to uphold the lawfulness, fairness and reasonableness (rationality) of the process under review. It is thus ordinarily an adjunct to, and not a substitution for, the decision of the relevant administrator.

### S297/2013

A recent case in which the High Court did effectively order the grant of a visa is *S297/2013 v Minister for Immigration and Border Protection*,\(^\text{54}\) a case that involved a complex and probably unique set of facts. S297 had arrived in Australia at Christmas Island by boat in May 2012. At the time, he was an ‘offshore entry person’, by means of his arrival at an ‘excised offshore place’, and therefore could not make a valid visa application (s 46A of the Act). However, in September 2012 the Minister decided, under s 46A(2), to lift the s 46A bar.

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\(^{52}\) *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 42.

\(^{53}\) Supra n44 at 600.

\(^{54}\) (2015) HCA 3.
and allow S297 to make an application for a Protection Visa. In February 2013 a
delegate refused S297’s application, a decision which was set aside by the RRT
and remitted to the decision maker in May 2013 with a direction that that S297
met the requirements of s 36(2)(a) of the Act.

The Minister and Department simply failed to make a decision on the remitted
application, a situation which was complicated by the election of a new
government on 7 September 2013. In 2014 the Minister purported to impose
caps on the granting of protection visas, an approach that was struck down by
the High Court in June 2014.\(^55\) In the end, French CJ made a consent order on
1 July 2014, issuing a writ of mandamus directing the Minister to decide S297’s
application according to law. What happened next can best be explained by
quoting the judgement in the 2015 decision:\(^56\)

> On 17 July 2014, the Minister decided to refuse to grant the plaintiff
> a Protection (Class XA) visa. The parties agree that the only reason the
> Minister refused to grant the plaintiff a protection visa was that the
> Minister was not satisfied that the cl 866.226 criterion was met. (It will
> be recalled that this criterion required the Minister to be satisfied that
> the grant of the visa ‘is in the national interest’.) The Minister’s decision
> record shows that he saw ‘the national interest’ as requiring refusal of
> a Protection (Class XA) visa to any and every unauthorised maritime
> arrival. That is, even though the Act provided, at all times relevant to
> these proceedings, that the Minister could decide that it is ‘in the public
> interest’ to permit an unauthorised maritime arrival to make a valid
> application for a permanent protection visa, the Minister’s decision in
> this case was that the national interest required that no such application
> should be granted.

The High Court found that this reasoning was unlawful, essentially on the
following basis:

- Section 46A prohibited an offshore entry person from making a valid visa
  application unless the bar was lifted under s 46A(2).
- The Minister did lift that bar in 2012. (The fact that this was a different
  Minister to the Minister who made the ultimate refusal decision was
  irrelevant.)
- The Minister could not therefore refuse the visa on the basis that the
  applicant had arrived in Australia unlawfully, as that issue had already been
decided in the applicant’s favour by lifting the bar in the first place.

\(^{56}\) Supra n54 at paragraph 13.
The remaining issue was what to do with the decision. The High Court found that the sole basis for the Minister’s refusal decision was that grant of the visa was not in the national interest, a ground that had just been set aside by the court. The Court stated as follows:57

No other basis for the decision having been identified, the Minister cannot, and should not, now be given any further opportunity to consider the matter afresh. It is not suggested that, in the time between the issue of the writ of mandamus and this Court’s determination of the present dispute about the sufficiency of the Minister’s return to that writ, there has been any relevant change in any circumstances affecting the disposition of the plaintiff’s application … [I]t is enough to observe that only one reason was given by the Minister for refusing the plaintiff’s application. That reason was legally insufficient. And in his return to the writ, the Minister had the opportunity to identify any other reason for refusing the application. None was identified. The Minister should not now be given any further opportunity to identify a reason for refusing the plaintiff’s application.

That is, because the RRT had already found S297 to be a person to whom Australia owed protection obligations, and the Minister’s sole reason for refusing the remitted application was found to be unlawful, there was nothing left for the Minister to decide and the court could issue a peremptory writ of mandamus,58 which is a very unusual remedy and not necessary to discuss in detail here, directing the grant of a permanent protection visa. Guo was not cited in the judgement. It therefore seems that a court can order the grant of a visa, but only in the very limited circumstances where there are no factual questions to be resolved and every ground for the refusal decision has been set aside by the court. It remains to be seen whether and how lower courts take advantage of this precedent and whether they see it (probably incorrectly) as overruling Guo.

Part 3 – Common law grounds of judicial review

The grounds on which an administrative decision can, at common law, be reviewed by a court is a topic for a textbook by itself. However, errors of law can be grouped into two broad categories – procedural and substantive. The substantive ground of ‘unreasonableness’ can be regarded as a synthesis of all other substantive errors, and will be considered separately as a result.

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57 Ibid at paragraph 41.
58 Ibid at paragraphs 37–47.
Procedural errors

Procedural errors are errors of law that relate to the procedure by which the decision was made, and not the substance of the decision. This is also known as a breach of ‘natural justice’ or ‘procedural fairness’. Failures of natural justice can be further classified as follows:

Failure to hear the ‘other side’

In the case of a migration application, the issue is usually whether the Minister has permitted an applicant to make his or her case, and in particular whether the applicant has been made aware of the substance of any information held by the decision maker that could result in the application being refused. The following points should be made:

1. It is not always necessary that the decision maker provide the applicant with the opportunity for an oral hearing. Written submissions can be sufficient.59

2. The officer who hears the matter must decide it. In the recent Full Federal Court decision of WZARH v Minister for Immigration and Border Protection60 an independent merits reviewer, appointed for the purpose of advising the Minister whether to permit a visa application under s 46A of the Act, became unavailable part-way through an application, after interviewing the applicant. The matter was handed to another reviewer who, without personally hearing from the applicant, recommended against an s 46A decision. The Full Federal Court found that the second decision maker should have heard from the applicant, and for that reason (amongst others) set the decision aside.

3. As previously discussed, the substance of any information held by the decision maker that is adverse to the applicant must be disclosed to that applicant for comment.61

4. The common law rules of natural justice can be displaced by clear statutory to the contrary.62

59 See for example Seiffert v Prisoners Review Board (2011) WASCA 148 at paragraph 72. See, however, the decision of the Supreme Court of Canada in Singh (Harbhajan) v Minister of Employment and Immigration (1985) 1 SCR 177, which found that applicants for refugee status did always require an oral hearing.

60 (2014) FCAFC 137.


Bias

The decision must not be affected by bias (whether actual or apprehended) on the part of the decision maker. The difference between the two tests is that the former looks at the subjective thought processes of the decision maker, and relies on a finding that the particular decision maker cannot in fact be persuaded by the evidence from his or her existing mindset, while the latter is a claim that a reasonable person would be likely to apprehend that a decision maker cannot be swayed by any evidence from an existing position, and is therefore an objective test. It is important to note that the mere existence of a pre-existing opinion on the part of the decision maker is not sufficient to set aside a decision on the grounds of actual or apprehended bias. Instead, ‘what must be firmly established is a reasonable fear that the decision maker’s mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her’.

Bias, although regarded as a procedural error, can often only be established once the decision is made and its reasons examined. For that reason, it is not uncommon for applicants to argue that a decision maker was biased, or in the alternative, that the decision was unreasonable.

There is a variety of ways in which the impartiality of a court or a tribunal may be or may appear to be compromised. Deane J in Webb v The Queen identified four of them as ‘distinct, though sometimes overlapping, main categories of case’. They were:

a) Interest – where the judge has an interest in the proceedings, whether pecuniary or otherwise, giving rise to a reasonable apprehension of prejudice, partiality or prejudgment;

b) Conduct – where the judge has engaged in conduct in the course of, or outside, the proceedings (the evidence of which can sometimes be seen in the decision itself), giving rise to such an apprehension of bias;

c) Association – where the judge has a direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and

d) Extraneous information – where the judge has knowledge of some prejudicial but inadmissible fact or circumstance giving rise to the apprehension of bias.

63 For a detailed history of the law of apprehended bias in Australia, see Ebner v Official Trustee in Bankruptcy (2000) 75 ALJR 277.
64 Minister for Immigration and Multicultural Affairs v Jia (2001) 205 CLR 507.
65 Bond v Australian Broadcasting Tribunal (1991) 173 CLR 78 at 86.
66 Sun, supra n38, is just one example.
67 (1994) 181 CLR 41 at 74.
Procedural legitimate expectations

Where an applicant has been led to believe that an administrative decision maker will follow a particular procedure, the decision maker cannot then depart from that procedure without first permitting the applicant to comment.

The best way to explain this principle is by example. In *Ng Yuen Shiu v Attorney-General (Hong Kong)* the Attorney-General, who was responsible for immigration in Hong Kong, issued a policy document stating that illegal entrants who came forward within a particular timeframe would be permitted to apply for permanent residence. Mr Ng came forward, and was promptly detained and scheduled for deportation. The Privy Council, hearing the appeal from a Hong Kong court, found that the Attorney-General must either allow Mr Ng to apply for permanent residence, or allow him to argue that the stated policy should be applied.

*Ng* was followed in Australia in *Haoucher v Minister for Immigration and Ethnic Affairs*, in which the Department informed Mr Haoucher, who had been convicted of an offence, that it did not propose to deport him on the basis of that offence. When Mr Haoucher was later convicted of another, less serious offence, the Department changed its mind and started deportation proceedings on the basis of the first offence. The same result as in *Ng* ensued – the Minister either had to abide by his word or allow Mr Haoucher to make submissions as to why the earlier representation should be followed. More recently, the Federal Court has found, in *Misiura v Minister for Immigration and Multicultural Affairs* and *WASB v Minister for Immigration and Citizenship* that while the Minister, acting personally, is not bound by a s 499 direction, departure from a relevant direction without prior notification to an applicant could amount to a failure to afford procedural fairness on the legitimate expectations ground.

Even more controversially, the High Court found in *Minister for Immigration and Ethnic Affairs v Teoh* that ratification of an international instrument acted as a ‘representation’ for the purposes of procedural legitimate expectations. The result was that any decision to deport Mr Teoh had to take the best interests of his seven Australian citizen children into account, because of Australia’s ratification of the Convention on the Rights of the Child. *Teoh* never created the legal revolution that it could have, for a number of reasons not necessary to

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68 In the UK, it is possible to argue for an error of law on the basis of substantive legitimate expectations, that is, that the applicant had been led to expect a certain result of an application, not merely a certain process – *R v North and East Devon Health Authority, Ex parte Coughlan* (2001) QB 213. This argument has never been accepted in Australia.


71 (2001) FCA 133.

72 (2013) FCA 1016 at paragraph 48.

discuss here, but it did create a fertile field for academics.\(^74\) The legal effectiveness of *Teoh* now appears to have been questioned by *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*\(^75\) in any event.

The concept of procedural legitimate expectations is somewhat similar to the concept of promissory estoppel. In *Waltons (Interstate) Stores v Maher*\(^76\) Waltons told Mr Maher that it would like to purchase certain vacant land owned by him on the condition that it was first cleared and remediated. Mr Maher did so, expending a considerable amount of his own money, but Waltons then reneged on the deal. The High Court found that Waltons had made a representation and that Mr Maher had relied on it to his detriment (in the form of land clearing costs), and that Waltons was therefore prevented (‘estopped’) from going back on its word. This concept is not exactly the same as procedural legitimate expectations because it can be difficult to show that the subject of an administrative decision ‘relied’ on any particular advice to his or her detriment. For example, did Mr Haoucher decide to reoffend on the basis of the deportation advice given to him by the Department?

Finally, neither estoppel nor legitimate expectations can prevent the application of legislation to an individual. In *Minister for Immigration and Ethnic Affairs v Polat*\(^77\), Mr Polat attempted to lodge an application for an entry permit at a counter, only to be wrongly told that the application could not be lodged without a marriage certificate. By the time Mr Polat received a certified copy of his marriage certificate the entry permit class had closed and his application could not be accepted. Mr Polat argued that the incorrect information provided to him meant that the Department was estopped from denying that the application was valid when it was finally made after the nominal closing date. The Full Federal Court rejected this argument, finding that the Regulations made it clear that the application could not be made after a certain date, and not even incorrect advice from the Department itself could change the situation. Mr Polat’s only redress was to sue the Commonwealth for negligence.


\(^76\) (1988) 164 CLR 387.

\(^77\) (1995) 37 ALD 394.
Substantive errors

The second kind of error of law is known as a *substantive* error, that is, one that goes to the substance of the decision and not merely the process by which it was made. Some of the major substantive errors are as follows.

Failure to take a relevant consideration into account and taking irrelevant considerations into account

The ‘relevant/irrelevant considerations’ ground, as it is popularly known, has a long history in Australia. For example, Latham CJ stated as follows in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*:\(^78\)

> It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed.

The obvious question is then when a consideration is deemed to be relevant or irrelevant. The key issue is the decision maker’s enabling legislation. For example, in *Minister for Immigration and Multicultural Affairs v Yusuf* McHugh, Gummow and Hayne JJ stated that ‘[t]he considerations that are, or are not, relevant to the Tribunal’s task are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider’,\(^79\) and further that ‘[t]hey are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision maker acts’\(^80\)

That is, in considering the grant or refusal of a visa, the relevant considerations are the relevant provisions of the Act and Regulations (in particular the Schedules 1 and 2 criteria) and applicable policy, at least where this is not inconsistent with the legislation. Obviously, when one gets to terms subject to interpretation, such as ‘real chance of persecution’ or ‘genuine and continuing relationship’, many sub-criteria open up. For example, in *Minister for Immigration and Citizenship v Li*\(^81\)

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\(^{78}\) (1944) 69 CLR 407 at 430; cited with approval in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) FCAFC 228 at paragraph 26.

\(^{79}\) (2001) 206 CLR 323 at paragraph 73.

\(^{80}\) Ibid at paragraph 74.

\(^{81}\) (2013) HCA 18.
the High Court, amongst other findings, found that the MRT had taken certain prior conduct on Ms Li’s part into account in deciding whether to adjourn a hearing, and stated as follows:82

[84] There remains the possibility that the previous conduct of Ms Li influenced the Tribunal. It had continued to question her about the false information associated with her application despite her repeated admissions and the advice that the case she wished to put forward did not depend upon that information. If her prior conduct was influential, the Tribunal took into account an irrelevant consideration for the reason that Ms Li’s conduct per se was not relevant to the visa criteria. The concern of the criteria is with the information relied upon to satisfy them, a point Ms Li’s migration agent attempted to make to the Tribunal.

[85] … In the circumstances of this case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute. Because error must be inferred, it follows that the Tribunal did not discharge its function (of deciding whether to adjourn the review) according to law. The Tribunal did not conduct the review in the manner required by the Migration Act and consequently acted beyond its jurisdiction.

No evidence

A ground of review that is obviously related to the ‘relevant / irrelevant considerations’ ground is the no evidence ground. In this case, the argument is that the decision maker had no evidence at all on which to base his or her decision. It appears that, in Australia, an administrative decision will only be set aside on the ‘no evidence’ ground where the decision maker had no evidence in relation to a finding on a jurisdictional fact.83 A ‘jurisdictional fact’ is a complex concept, but essentially it is a fact that must exist before the decision maker can even consider the matter before them. For example, M70/2011 and M106/2011 v Minister for Immigration and Citizenship84 was concerned with s 198A of the Migration Act 1958, and in particular with the government’s so-called ‘Malaysia solution’, which involved processing of asylum-seekers who arrived illegally in Australia in Malaysia, in return for Australia accepting persons from Malaysia who had been determined by the United Nations High Commission for Refugees (UNHCR) as having refugee status. Subsection 198A(1) provided that ‘an officer

82 Ibid at paragraphs 84 and 85.
84 (2011) HCA 32.
may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3)’. Subsection 198A(3) then provided as follows:

The Minister may:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection for persons seeking asylum, pending determination of their refugee status; and

(iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and

(iv) relevant human rights standards in providing that protection; and

(b) in writing, revoke a declaration made under paragraph (a).

The High Court found that ss 198A(3)(a)(i)–(iv) were jurisdictional facts, and the Minister could not make a s 198A(1) determination unless he or she could be satisfied that all were met. The High Court went on to find that as Malaysia was not a signatory to the Convention on the Status of Refugees, the Minister had no evidence that any of ss 198A(3)(a)(i)–(iv) were met, and that the declaration of Malaysia as a ‘specified country’ was therefore invalid.85

Inflexible application of policy

While it is perfectly lawful for a decision maker to set out policy to assist him or her in making decisions, he or she must not act as if he or she is bound by that policy in the same way as legislation. That is, a ‘refusal to entertain the possibility that a particular case might fall outside the policy, or require its re-consideration’86 is an error of law.

As has been previously noted, policy is a crucial consideration in Departmental decision-making. The Full Federal Court has noted that it is open to the MRT and RRT ‘in the interests of consistency, to apply the departmental policy unless


86 Neat Domestic Trading Pty Ltd v AWB Ltd (2003) 216 CLR 277 at paragraph 26; citing with approval British Oxygen Co Ltd v Minister of Technology (1971) AC 610 at 624–25.
there were cogent reasons for departing from it’.\textsuperscript{87} However, there is a difference between deciding to follow a policy unless good reasons can be shown to depart from it, and following policy as if it was law. It is therefore somewhat curious that this ground has rarely been successfully argued in Australian courts in immigration cases.

One case where the inflexible application of policy argument was successfully run was \textit{Jackson v Minister for Immigration and Multicultural and Indigenous Affairs}.\textsuperscript{88} In this case the MRT found that an applicant was not a ‘special need relative’, based primarily on its application of the PAMs. In particular, the PAMs stated that ‘[i]t is policy that, in the absence of other extenuating circumstances, NONE OF THE FOLLOWING ON THEIR OWN CONSTITUTES A SERIOUS CIRCUMSTANCE, A PERMANENT OR LONG-TERM NEED OR REQUIRES SUBSTANTIAL AND CONTINUING ASSISTANCE’ (emphasis in original), and then provided a list of such circumstances. The MRT found that ‘at the time of the visa application, the further evidence is that the assistance rendered by the visa applicant was of the kind excluded by policy’.\textsuperscript{89} Lee, Carr and Moore JJ, constituting the Full Federal Court, stated as follows:\textsuperscript{90}

\begin{itemize}
\item [19] As is apparent from paras 35, 36 and 37 from the Tribunal’s reasons it did not accept that the assistance actually being provided by the appellant to the nominator at the time of the application could be viewed as substantial for the purposes of the definition of ‘special need relative’ and therefore could not sustain a conclusion that the nominator had a permanent or long-term need for assistance.

\item [20] In adopting this approach the Tribunal erred in one and possibly two respects. First it took the view that the terms in which the Procedures Advice Manual was expressed, excluded from consideration any assistance which might be provided by the appellant to his mother which took the form of the assistance described in para 3 of the Manual … [B]y adopting this approach, the Tribunal did not consider for itself whether the assistance being provided and which might continue to be provided, was substantial. It said the assistance relied on ‘was of the kind excluded by the policy’. In effect, the Tribunal did not treat the Manual as a guide but rather treated it as actually determining in a prescriptive way the question the Tribunal was required to answer having regard to the definition of ‘special need relative’.
\end{itemize}

\textsuperscript{87} \textit{Braganza v Minister for Immigration and Multicultural and Indigenous Affairs} (2003) FCAFC 170 at paragraph 31.
\textsuperscript{88} (2003) FCAFC 203.
\textsuperscript{89} Ibid at paragraph 14, quoting paragraph 36 of the MRT’s decision.
\textsuperscript{90} Ibid at paragraphs 19 and 20.
Their Honours went on to note that inflexible application of policy by a decision maker can be characterised as a jurisdictional error\(^91\) and set the MRT’s decision aside.

**Improper exercise of power**

The term ‘improper exercise of power’ means exactly what it says. Even when a discretion is entirely unconstrained by the terms of the legislation, an administrative decision maker will make an error of law if he or she uses that power for purposes other than those that were intended by the legislation.

The best known example of a case in which a decision was found to amount to an improper exercise of power is the decision of the Supreme Court of Canada in *Roncarelli v Duplessis*.\(^92\) Mr Roncarelli was a restaurant owner in Montreal and a prominent Jehovah’s Witness, and M Duplessis was the Premier of Quebec. At that time, many Jehovah’s Witnesses were being arrested for distributing religious tracts in violation of provincial and municipal laws, and Mr Roncarelli regularly posted bail for them. Duplessis publicly warned Roncarelli to cease this practice, and when he did not, Mr Roncarelli’s liquor licence was cancelled. This forced the closure of his restaurant, and Roncarelli went to the Supreme Court.

Duplessis argued that the relevant legislation, the *Loi Concernant les Spiritueux* (‘Act Respecting Alcoholic Liquor’), gave the decision maker complete discretion as to the cancellation of a liquor licence. The Supreme Court nevertheless overturned the decision because it was incompatible with the purpose of the Act. Mr Roncarelli’s licence had been cancelled not because he served alcohol irresponsibly, but because he was being punished for assisting Jehovah’s Witnesses with posting bail.

Cases in which an improper exercise of power has been successfully argued in Australia are rare. On occasion, a court has found that the cumulative effect of numerous errors in a decision-making process can lead to a finding of an improper exercise of power,\(^93\) but *Roncarelli*-type rulings are few and far between. One example of a finding of an improper exercise of power was in *Park v Minister for Immigration and Ethnic Affairs*. Holding the detained Korean workers in detention until they ‘snitched’ on the organisers of the perceived ‘racket’ was held to be an improper purpose of immigration detention.

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\(^{92}\) (1959) SCR 121.

\(^{93}\) See for example *Che Guang Xiang v Minister of Immigration Local Government and Ethnic Affairs* (1994) FCA 1037.
One case in which an improper exercise of power was prominently but unsuccessfully argued was *Minister for Immigration and Multicultural Affairs v Jia*, in which the Minister, after the AAT set aside a decision to refuse Mr Jia’s visa under s 501, granted the visa and then cancelled it. Jia argued that this was an abuse of power, and a decision aimed at punishing him rather than genuinely assessing his case. The High Court unanimously disagreed, finding that as the Act did not prevent the Minister from acting as he did, his actions were lawful. In particular, the AAT is part of the executive, and circumventing its decision did not breach the separation of powers principle.

The sum of all substantive review: Unreasonableness

Unreasonableness is the most problematic of the substantive grounds of review, and strongly questions the insistence of Australian courts that they do not engage in ‘merits review’. Unreasonableness requires an inquiry into the merits of the decision. Even if a court finds that it will only set that decision aside if the unreasonableness is extreme in some sense, it is still a review of the merits of the decision. In Canada, all substantive grounds of review have been collapsed into the general ground of unreasonableness, and Canadian administrative law is much simpler for it.

The ground of judicial review known as ‘unreasonableness’, sometimes known as ‘Wednesbury unreasonableness’, has a long history in Australian administrative law. For most of its existence, a decision must have been found to be outrageous or completely devoid of merit – ‘so unreasonable that no reasonable authority could ever come to it’ – to be struck down on this basis. For example, in *Australian Retailers Association v Reserve Bank of Australia* Weinberg J stated that ‘the current view, in this country, seems to be … to regard this ground as representing a safety net, designed to catch the rare and totally absurd decision which has somehow managed to survive the application of all other grounds of review’.

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94 Supra n64.
95 A case where an improper purpose argument was upheld is *Park Oh Ho v MIEA* (1988) 20 FCR 104.
96 Referring to *Associated Provisional Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 223.
97 Ibid at 230.
History in the High Court prior to 2013

It appears that the first High Court decision based at least partly on a *Wednesbury* unreasonableness argument was *Election Importing Co Pty Ltd v Courtice*,99 which was handed down on 1 July 1949. *Courtice* concerned a dispute over the imposition of import duties, and one of the grounds of the appeal was that Mr Courtice had exercised a discretionary power in an unreasonable manner. Williams J found that despite the fact that the discretion was unfettered on its face, ‘the *Customs (Import Licensing) Regulations* do not in my opinion confer on the Minister or his delegate an arbitrary and uncontrolled power to revoke a licence’.100

The High Court did not decide another unreasonableness case until the 1972 decision of *Parramatta City Council v Pestell*,101 which concerned the council’s ability to impose a ‘local rate’ on specified land, under s 121 of the *Local Government Act 1919* (NSW). Gibbs JA, as he then was, summed up the issue as follows:102

> [T]he legislature has left it to the council to form its opinion as to whether a particular work is of special benefit to a portion of the area. A court has no power to override the council’s opinion on such a matter simply because it considers it to be wrong. However, a court may interfere to ensure that the council acts within the powers confided to it by law … Even if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it.

The High Court found that the Council had misconstrued its power under the Act. A particular concern was that 90 dwellings had been specifically excluded from the special rating provisions, and there was no clear reason why. Stephen J stated that ‘the facts make it clear that that portion of the council area left after excising the ninety-odd lots is not such a portion as is reasonably capable of being considered as the portion specially benefited by the works here proposed’.103 Fourteen years later, Mason J, as he then was, stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that *Pestell* ‘embraced’ the *Wednesbury* test in Australia.104

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99 (1949) 80 CLR 657.
100 Ibid at paragraph 12. This finding is similar to *Roncarelli v Duplessis*, supra n90, but unlike Mr Roncarelli, the applicants in *Courtice* failed to demonstrate unreasonableness on the part of the decision maker.
101 (1972) 128 CLR 305.
102 Ibid at paragraph 2 of the judgment of Gibbs JA.
103 Ibid at paragraph 13 of the judgment of Stephen J.
104 (1986) 162 CLR 24 at paragraph 15 of the judgment of Mason J.
Prior to the decision in *Minister for Immigration and Citizenship v Li*, the High Court made the following important comments on the unreasonableness ground:

1. The basis of the unreasonableness ground was briefly discussed in *Kruger v Commonwealth* (the ‘Stolen Generations Case’), where Brennan CJ stated that ‘when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised’. Brennan CJ also noted that ‘[r]easonableness can be determined only by reference to the community standards at the time of the exercise of the discretion’.

2. In *Abebe v Commonwealth* the High Court found that s 476 of the *Migration Act 1958*, which at that time excluded a claim of *Wednesbury* unreasonableness from the jurisdiction of the Federal Court, was constitutionally valid.

3. It was made clear in *Eshetu v Minister for Immigration and Multicultural Affairs* that mere disagreement with an administrative decision is not sufficient for a finding of unreasonableness. Gleeson CJ and McHugh J stated as follows:

   Someone who disagrees strongly with someone else’s process of reasoning on an issue of fact may express such disagreement by describing the reasoning as ‘illogical’ or ‘unreasonable’, or even ‘so unreasonable that no reasonable person could adopt it’. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.

4. Along similar lines, the Mason CJ and Deane J of the High Court found in *Minister of State for Immigration and Ethnic Affairs v Teoh* that for a decision to be *Wednesbury* unreasonable, the decision maker must make his or her decision ‘in a manner so devoid of plausible justification that no reasonable person could have taken that course’.

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105 Supra n81.
106 (1997) 146 ALR 126 at 135.
107 Ibid.
108 Abebe, supra n8.
109 Eshetu, supra n8.
110 Ibid at paragraph 40.
5. The ‘weight’ given to certain considerations may, at least in extreme circumstances, render a decision unreasonable. Mason CJ stated as follows in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:\textsuperscript{112}

> [I]n some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is ‘manifestly unreasonable’.

**SZMDS**

The High Court gave detailed consideration to the unreasonableness ground in the 2010 decision of *SZMDS v Minister for Immigration and Citizenship*:\textsuperscript{113} The case involved an applicant for a Protection Visa, who claimed a well-founded fear of persecution on the basis of his membership of a particular social group, namely homosexuals. The RRT rejected his claim, not accepting that he was even homosexual.

The RRT decision was set aside by the Federal Court, which found that the ‘Tribunal’s conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning’:\textsuperscript{114} On appeal to the High Court, the Minister argued that the RRT’s findings were not illogical, and that even if they were, this did not amount to a ‘jurisdictional error’. The leading judgement was given by Crennan and Bell JJ, with whom Heydon J agreed. Gummow ACJ and Kiefel J gave separate reasons, concurring on this point. Crennan and Bell JJ started by finding that the Minister’s satisfaction, referred to in s 65, was a jurisdictional fact.\textsuperscript{115} The key passage in the judgement is at paragraphs 119 and 120:

> [119] Whilst the first respondent accepted that not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, it was contended that if illogicality or irrationality occurs at the point of satisfaction (… s 65 of the Act) then this is a jurisdictional fact and a jurisdictional error is established. This submission should be accepted …

\textsuperscript{112} Supra n52.
\textsuperscript{113} (2010) HCA 16.
\textsuperscript{114} *SZMDS v Minister for Immigration and Citizenship* (2009) FCA 210 at paragraph 29.
\textsuperscript{115} Referring to *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12.
An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error.

In other words, illogicality or irrationality in finding of jurisdictional facts is a jurisdictional error and will result in the decision under review being set aside. Crennan and Bell JJ further elaborated on this point as follows:

In the context of the Tribunal’s decision here, ‘illogicality’ or ‘irrationality’ sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words … it is an allegation of the same order as a complaint that a decision is ‘clearly unjust’ or ‘arbitrary’ or ‘capricious’ or ‘unreasonable’ in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached.

However, Crennan and Bell JJ found that the RRT’s findings were open to it on the evidence before it, and that ‘a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker’. The Federal Court decision was therefore set aside and the RRT decision restored.

**Minister for Immigration and Citizenship v Li**

The basic facts in *Li* are set out in paragraph 3 of the judgement, in which French CJ states as follows:

The first respondent applied for a Skilled – Independent Overseas Student (Residence) (Class DD) visa on 10 February 2007 which required satisfaction of a ‘time of decision criterion’ set out in cl 880.230(1) of sch 2 to the Migration Regulations 1994 (Cth) (‘the Regulations’), namely that:

A relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no
evidence has become available that the information given or used as part of the assessment of the applicant’s skills is false or misleading in a material particular.’

The application was supported by a skills assessment made on 8 January 2007 by TRA\textsuperscript{119}. The assessment was found to be based on false information submitted to TRA by the first respondent’s former migration agent and on 13 January 2009 the Minister’s delegate refused the application for a visa. The first respondent, through a new migration agent, applied to the MRT for review of the delegate’s decision on 30 January 2009. The migration agent submitted a fresh application to TRA for a new skills assessment on 4 November 2009.

The MRT convened a hearing for 18 December 2009 and on 21 December 2009 wrote to the first respondent inviting comment upon allegedly untruthful answers given to departmental officers in connection with her initial application. It required a response by 18 January 2010, but advised the first respondent that she could seek an extension of time.

On 18 January 2010, the first respondent’s migration agent replied to the MRT’s letter of 21 December 2009 and advised that the application for a second skills assessment had been unsuccessful. The migration agent pointed out ‘two fundamental errors’ in TRA’s assessment and said that the first respondent had applied to TRA for review of its adverse decision. The migration agent requested the MRT to ‘forbear from making any final decision regarding her review application until the outcome of her skills assessment application is finalised’…

On 25 January 2010, without waiting for advice of the outcome of the migration agent’s representations to TRA, the MRT affirmed the delegate’s decision … It did not explain its decision to proceed to a determination beyond saying:

‘The Tribunal considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further and in any event, considers that clause 880.230 necessarily covers each and every relevant assessing authority’s assessment.’

\textsuperscript{119} Trades Recognition Australia.
Ms Li succeeded at the Full Federal Court in her argument that the MRT had acted unreasonably in making its decision prior to the new skills assessment being provided. The Full Federal Court found that a refusal to adjourn the MRT hearing amounted to a jurisdictional error, and stated as follows:\footnote{120}{(2012) FCAFC 74 at paragraph 29.}

The appearance afforded by the MRT to an applicant by [an] invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act. An unreasonable refusal of an adjournment of the proceeding will not just deny a meaningful appearance to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of s 75(v) of the Constitution.

In other words, the MRT’s unreasonable refusal to adjourn the hearing led to a breach of its own enabling legislation, and therefore to a jurisdictional error.

\section*{High Court judgement}

On the Minister’s appeal to the High Court, French CJ found that the reasons of the MRT made ‘no reference to the probability that [Ms Li] would be able, within a reasonable time, to secure the requisite skills assessment’.\footnote{121}{Supra n81 at paragraph 21.} The Chief Justice held that the concept of unreasonableness:\footnote{122}{Ibid at paragraph 28.}

\ldots reflects a limitation imputed to the legislature on the basis of which courts can say that parliament never intended to authorise that kind of decision. After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusion about the correct or preferable decision. However the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

As a result, French CJ found that the MRT decision to deny Ms Li the adjournment did not engage with the submission made on her behalf about the imminent decision by TRA. His Honour held that there was ‘an arbitrariness about the decision, which rendered it unreasonable’.\footnote{123}{Ibid at paragraph 31.}
In a joint judgment, Justices Hayne, Kiefel and Bell developed further the idea that unreasonableness is linked to rationality and logicality. Their Honours held that ‘[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification’. While their judgment admitted that in some cases decision maker may decide that ‘enough is enough’, and certainly an administrative tribunal cannot be expected to adjourn a matter indefinitely, they held that it was not clear how the MRT reached that conclusion in the particular circumstances of Ms Li’s case. As the decision lacked an ‘evident and intelligible justification’, it was unreasonable.

Hayne, Keifel and Bell JJ also noted as follows:

The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in Wednesbury. This aspect of his Lordship’s judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.

Here we see a clear acknowledgement that ‘reasonableness’ has moved on from indefensible ‘red-haired teachers’ situations. Unreasonableness can be ascertained from looking at the decision as a whole, and asking whether there is an intelligible basis to that decision. In this case, it was found that there was no attempt by the MRT to explain why Ms Li’s request for an adjournment should be refused, looking at all the circumstances of her individual case, and this failure rendered the decision unreasonable.

Finally, Gageler J held that decision-making authority ‘conferred by statute must be exercised according to law and to reason within limits set by the subject-matter, scope and purpose of the statute’. His Honour found that the MRT’s decision lacked a true weighing-up of Ms Li’s application for an adjournment, stating that ‘[t]he MRT identified no consideration weighing in favour of an immediate decision on the review and none is suggested by the Minister’. This is the same kind of reasoning as the joint judgement, looking at the matter from the opposite perspective – Hayne, Keifel and Bell JJ emphasised that the MRT failed to properly consider a request for an adjournment, while Gageler J
takes the view that the MRT made a decision to proceed to an immediate conclusion of Ms Li’s application. Either way, the decision was unreasonable, as it did not consider all the circumstances of Ms Li’s case.

Gageler J also made some significant comments on the scope of unreasonableness in his judgement, and indicated that it should move on from the classic *Wednesbury* formulation. His Honour stated that ‘[r]eview by a court of the reasonableness of a decision made by another repository of power ‘is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process’ but also with ‘whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law’,129 expressly applying the Canadian reasonableness formulation. The ‘possible, acceptable outcomes’ formula has been applied in a number of cases since, although not expressly by the High Court.

In summary, the High Court in *Li* has expanded the unreasonableness formulation from outrageous and indefensible decisions to those that lack an ‘intelligible basis’, or those that fall outside a range of ‘possible, acceptable outcomes’. The High Court now appears to be focused on whether the reasons for an administrative decision allow it to ascertain a justification for that decision, a theme taken up in the pre-*Li* decision of *SZOOR v Minister for Immigration and Citizenship*130 and a number of cases since. The reasonableness of a decision maker’s *procedures* will also be important.

**Post-*Li* Decisions**

*Li* has been cited frequently by all levels of courts since it was handed down. The High Court has yet to revisit the reasonableness issue, except to briefly dismiss the plaintiff’s unreasonableness argument in *S156-2013 v Minister for Immigration and Border Protection*.131 *Li* has, however, been successfully invoked in a number of court decisions, including:

1. *Minister for Immigration and Border Protection v Singh (Vikram)*,132 which involved a set of facts remarkably similar to *Li* itself, this time concerning an English test score instead of a skills assessment. The decision of the MRT to refuse an adjournment to allow Mr Singh to seek review of an International English Language Testing System (IELTS) result with the testing authority was held to fall squarely within the *Li* scope of unreasonableness.

129 Ibid at paragraph 105, citing *Dunsmuir v New Brunswick*, supra n5 at paragraph 47.
130 (2012) FCAFC 58 at paragraph 8.
131 (2014) HCA 22 at paragraph 44.
2. In *SZSNW v Minister for Immigration and Border Protection*\(^{133}\) an ‘independent merits reviewer’ had made findings adverse to the applicant’s credibility, after he raised an allegation of ‘sexual torture’ that had not been disclosed to the primary decision maker. The Federal Circuit Court found that a decision is unreasonable ‘when a decision maker makes a choice that is arbitrary, capricious or without common sense’,\(^{134}\) and was particularly critical of the way in which the reviewer appeared to ignore procedural instructions for dealing with applicants for refugee status who make claims of this kind.\(^{135}\) The decision was therefore set aside.

3. In *SZRHL v Minister for Immigration and Citizenship* the Federal Court noted as follows:\(^{136}\)

> [H]aving regard to [*Li*], it must now be accepted that the Tribunal is constrained to undertake its ‘core function’ of review reasonably, which includes exercising, reasonably, ancillary discretionary powers granted to the Tribunal for that purpose. A decision on review would only transgress this underlying requirement of reasonableness and thereby constitute jurisdictional error if the decision were so unreasonable that no reasonable Tribunal could have so decided the review application. That is a conclusion to be reached with restraint, having regard to the constitutional separation of powers and recognition that the task of determining eligibility for the grant of a protection visa is one consigned by Parliament to the Executive, not to the Judiciary.

This was another credibility case, in which the applicant made claims before the Refugee Review Tribunal (RRT) that the RRT considered had not been made to the primary decision maker. The issues in question *had* been mentioned in the applicant’s original protection visa application form, although they had not been expanded on since. The adverse credibility finding made by the RRT was therefore based on an incorrect set of facts, and the court found that they could therefore have ‘been deprived of the possibility of a successful outcome on the merits of their protection visa applications’.\(^ {137}\) The RRT decision was therefore unreasonable and was set aside.

It is also worth noting that *Li* has been applied by a number of State Supreme Courts, seemingly most frequently in Victoria. For example, *Topouzakis v Greater Geelong City Council*\(^ {138}\) involved a decision by the Council to exclude

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133 (2014) FCCA 134.
134 Ibid at paragraph 52.
135 Ibid at paragraph 47.
137 Ibid at paragraph 37.
an employee from leisure centres managed by it, which effectively terminated his employment. A number of patrons had campaigned to have the applicant dismissed after a previous criminal conviction incurred by him came to light, a conviction of which the Council was already aware. After quoting from *Li*, the Supreme Court of Victoria stated that the issue in the case at hand was ‘whether the Council’s decision to impose the ban is ‘reasonable’ in the sense that there is evident and intelligible justification for it and whether the ban is proportionate to the breaches of the Local Law identified by the Council’.*139* In the end, the Court found that the decision to ban the applicant from the premises contravened Council by-laws, as it was made on the basis of a perceived lack of remorse on the part of the applicant, rather than the safety of patrons of Council property.

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139  Ibid at paragraph 71.